BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GLAFIRA CAMACHO	)	
Claimant	)	
V.	)	
	)	
NORCRAFT COMPANIES	)	
Respondent	)	Docket No. 1,062,102
AND	)	
	)	
TRAVELERS INDEMNITY CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the April 17, 2015, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on August 4, 2015, in Pittsburg, Kansas.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for claimant. Kendra M. Oakes of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

ALJ Klein found claimant had a history of dizziness predating her alleged accident and the history taken at the emergency room after claimant's accident only referenced a history of dizziness and not a trip and fall incident. The ALJ found claimant failed to prove her fall arose out of and in the course of her employment and denied compensation.

Claimant contends her injury arose out of and in the course of her employment. She maintains the ALJ's Award is not based on evidence in the record. Claimant argues the ALJ erred in applying K.S.A. 2011 Supp. 44-508(f)(3). At oral argument, claimant

asserted preliminary hearing transcripts are not part of the record and should not have been considered by the ALJ. Claimant contends her date of hire dictates her rights, such that statutory amendments implemented on May 15, 2011, do not apply.

Respondent contends claimant failed to prove her accident arose out of and in the course of her employment; rather, it is more likely than not claimant's injuries resulted from a personal risk or an idiopathic cause. If this claim is compensable, respondent asserts the Board should find claimant sustained a 9% permanent functional impairment to the right lower leg. Respondent argues the Board should find claimant failed to prove the medical bills offered into evidence were related to treatment that was reasonable and necessary to cure or relieve the effects of the October 7, 2011, injury. Finally, respondent submits the ALJ properly applied the Kansas Workers Compensation Act in effect on the date of claimant's accident.

The issues are:

1. Are the preliminary hearing transcripts part of the record?

2. Does K.S.A. 2011 Supp. 44-508 apply to this claim?

3. Was claimant's accident the result of a personal risk or an idiopathic cause?

FINDINGS OF FACT

This is the second time this claim has been on appeal to the Board. In a December 12, 2013, Order, a Board Member affirmed the ALJ's September 2013 Order, finding claimant failed to prove her personal injury by accident arose out of and in the course of her employment with respondent and concurring with the ALJ that claimant's fall was most likely the result of a personal risk. The facts contained in the Board's December 12, 2013, Order are incorporated herein by reference. However, the Board will not consider any facts contained in its December 12, 2013, Order excluded by K.S.A. 44-519 or other provisions of the Kansas Workers Compensation Act.

At the regular hearing, claimant testified, through an interpreter, that she became employed by respondent in January 2003. On October 7, 2011, she was packing doors in a box using an air compressor gun when she tripped over the air compressor hose and fell, striking her right knee on the concrete floor. She indicated she did not pass out and was yelling for help, but coworkers were wearing earplugs and could not hear her. Claimant was not immediately assisted to her feet. Ice was placed on her knee. Sherrill Garza, human resources and safety specialist, took claimant outside the building where claimant's husband then took claimant home. Claimant indicated she did not ask Ms. Garza to send her to the hospital because she was in pain and confused. That day, claimant's husband took claimant to the Newton Medical Center emergency room. Initially, claimant had no interpreter, but called a friend to interpret for her.

Claimant confirmed she was diagnosed with diabetes in 1999. She testified that prior to May 15, 2011, she used to have low blood sugar because her doctor gave her the wrong insulin dosage. She changed to another doctor, who corrected her dosage.

Claimant denied her diabetes was out of control in September 2011, but admitted there were occasions when her blood sugar level "rose a little."[1] At the January 22, 2013, preliminary hearing, claimant testified as follows:

> Q. During the two weeks prior to October 7th, 2011, did you have any incidents where you became dizzy and felt like you were going to pass out, or did pass out because of your diabetes at work?
>
> A. My sugar level went down.
>
> Q. Is that related to your diabetes?
>
> A. Yes.
>
> Q. And I believe when we took your deposition you indicated that that happened twice during the two weeks before October 7th, 2011; is that correct?
>
> A. Yes.
>
> Q. And on one of those occasions did you actually pass out?
>
> A. No.
>
> Q. Ma'am, if I understood your testimony correctly during your deposition, I believe you testified that in one of the occasions you became very dizzy but did not faint, and on the other occasion you actually fainted; is that correct?
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> A. They moved me to a dining table, and at that point I kind of -- two people were taking me and I lost consciousness at that point.
>
> Q. And was that because of your diabetes?
>
> A. I imagine, yes.[2]

At the regular hearing, claimant was again asked about her December 2012 deposition testimony:

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[1] R.H. Trans. at 22.

[2] P.H. Trans. (Jan. 22, 2013) at 16-17.

> Q. I also asked you, had you experienced any dizziness or sensations of fainting during the two weeks before October 7, 2011, and your answer was, "Yes, yes, the sugar got low."
>
> A. I answered you that I felt like I was trembling, which is different than feeling dizzy.[3]

Later in her regular hearing testimony, claimant also admitted that on one occasion in the two weeks prior to her accident she fainted because it was very hot and several other coworkers also fainted. Claimant related she was feeling bad and was being escorted to the dining room where it was cooler and she could drink water, when she fainted. Claimant indicated she did not know if her fainting was related to her diabetes.

Ms. Garza testified she speaks English and Spanish and is diabetic. She arrived at the accident scene shortly after claimant's fall. Ms. Garza asked claimant what happened and claimant said she felt dizzy and fell. According to Ms. Garza, she asked if claimant had taken her insulin and claimant said yes. Ms. Garza testified she asked claimant how her sugar had been and claimant said it had been reaching highs and lows. With claimant's permission, Ms. Garza tested claimant's sugar level and showed claimant the results. Ms. Garza testified she asked claimant if the reading was high for her and claimant answered in the affirmative. According to Ms. Garza, claimant did not ask to be taken to a doctor.

Ms. Garza indicated that sometime in the two weeks prior to October 7, 2011, she was called to the floor because claimant blacked out. When Ms. Garza arrived, claimant was sitting and was shaky and sweating. Ms. Garza testified she asked claimant how her sugar had been and she replied it had been reaching highs and lows. According to Ms. Garza, on another occasion in the two weeks before claimant's accident, claimant had to be helped into the lunchroom to cool off and complained her blood sugar was hitting highs and lows.

Dr. Karolyn M. Cook, who treated claimant at the Newton Medical Center emergency room on October 7, 2011, testified claimant's medical records indicated she had a language barrier (Spanish) and had an interpreter. Dr. Cook testified she speaks some Spanish and can generally understand a Spanish-speaking patient without an interpreter. She felt claimant's interpreter was doing an adequate job interpreting. For the last 23 years, Dr. Cook has traveled to Mexico to work in a medical clinic for two weeks and on one occasion stayed one month.

Dr. Cook testified claimant reported her mechanism of injury was that she became lightheaded, lost her balance and fell. According to Dr. Cook, claimant reported a history

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[3] R.H. Trans. at 25.

of becoming lightheaded, which claimant attributed to fluctuations in her blood sugar. Claimant reported having a similar episode the day before her accident, when she was hypoglycemic or had low blood sugar. The doctor indicated Newton Medical Center's records did not contain any notes that claimant tripped over a hose. If claimant had mentioned that she tripped on a hose and fell, Dr. Cook testified she would have included it in her notes.

Dr. Kathryn R. Hayes, claimant's personal physician, has provided medical care for claimant since July 2006. Dr. Hayes' records indicated claimant was seen by a physician assistant on September 9, 2011, for edema in her legs, feet, hands and face. Claimant's current medical problems were listed, including uncontrolled Type 2 diabetes, hyperlipidemia and hypertension. It was recommended claimant avoid prolonged standing. On November 14, 2011, claimant saw Dr. Hayes and reported falling at work. Dr. Hayes' notes do not contain an explanation of how or why claimant fell at work. The doctor again indicated claimant had uncontrolled diabetes.

Dr. Pedro A. Murati testified that when he first evaluated claimant on October 17, 2012, she gave a history of injuring her right knee when she tripped over a hose and fell on October 7, 2011. The doctor admitted not having claimant's emergency room records from Newton Medical Center when he evaluated claimant. At Dr. Murati's evaluation of claimant, her blood pressure was 178/103. Dr. Murati's diagnoses were probable right lower extremity deep vein thrombosis, right patellofemoral syndrome, right high ankle sprain, right Achilles bursitis, right plantar fasciitis and metatarsalgia of the right second and third metatarsal heads.

Dr. Murati evaluated claimant a second time on May 22, 2013. The doctor noted claimant was seen by Dr. Hayes from November 14, 2011, through January 5, 2012, and on November 14, 2011, was diagnosed with uncontrolled diabetes and several other maladies. One of Dr. Murati's diagnoses was uncontrolled hypertension. He also diagnosed claimant with right patellofemoral syndrome, right high ankle sprain, right Achilles bursitis, right plantar fasciitis and metatarsalgia of the right second and third metatarsal heads, which he opined were the direct result of her work injury.

Subsequent to the Board's December 12, 2013, Order, Dr. Murati re-evaluated claimant on April 23, 2014. The doctor testified claimant was diagnosed with high blood pressure in 1990 and diabetes in 1998. Dr. Murati's diagnoses were right trochanteric bursitis secondary to antalgic gait, right patellofemoral syndrome, right high ankle sprain, right Achilles bursitis, right plantar fasciitis and metatarsalgia of the right second, third and fourth metatarsal heads.

Dr. Murati testified there is a machine that is a constant injection pump that can tell, to the second, a person's blood glucose level. Drawing blood from a person's finger tells his or her blood glucose level at the time the blood was drawn. The doctor testified that when a diabetic has an accident, his or her blood sugar level goes up; therefore, tripping

and falling caused claimant's blood glucose level to rise. Dr. Murati opined that claimant's diabetes did not cause her to fall and was "not within scientific probability"[4] and it was more likely than not that the prevailing factor for claimant's fall was tripping over the hose. The doctor testified:

> I don't believe this is a diabetic related incident. It doesn't make any sense. I mean, she got up. If it was hypoglycemia she wouldn't have got up, somebody would have found her passed out hopefully in time and give her some sugar to save her life. And if it was a hyperglycemia episode she would have demonstrated many more complications from diabetes.[5]

Dr. Murati indicated he was not aware claimant had became lightheaded or dizzy on two occasions during the two weeks prior to October 7, 2011.

Dr. Murati testified that in the medical field, idiopathic means "the known of disease of an unknown cause."[6] Dr. Murati testified the medical records from Newton Medical Center did not indicate claimant was dehydrated, hypoglycemic or hypotensive. The doctor did not have a medical explanation for claimant's fall and her description of events is more accurate; therefore, claimant's fall must have occurred because she tripped over the hose. Dr. Murati opined that pursuant to the *Guides*,[7] claimant has a 25% right lower extremity functional impairment. The doctor also assigned claimant permanent work restrictions.

Dr. John P. Estivo first evaluated claimant on August 2, 2013. He noted claimant gave a history to Dr. Hayes of fainting spells and uncontrolled blood sugars. Dr. Estivo testified claimant reported that on October 7, 2011, she fell onto her right knee after tripping over an air compressor cord. He noted that when claimant presented to the Newton Medical Center emergency room on October 7, 2011, she did not give a history of tripping on a hose at work and falling, but rather gave a history of becoming lightheaded, turning, losing her balance and falling to the floor. The doctor noted that when claimant testified and saw Dr. Murati, she indicated she tripped over a hose at work and fell. Dr. Estivo opined claimant's dizziness on the date of her accident was related to a preexisting condition. The doctor indicated in his report and testified claimant's blood sugar around the time of her work accident was not low enough to cause dizziness.

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[4] Murati Depo. at 36.

[5] *Id.* at 37.

[6] *Id.* at 32.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Estivo evaluated claimant again on October 6, 2014. Claimant presented with lumbar spine, right hip, right knee and right ankle pain complaints. The doctor's physical examination of claimant was normal, other than subjective right-sided lumbar spine pain extending into the right buttock and right knee and right ankle generalized discomfort throughout range of motion testing. Dr. Estivo found claimant's responses a bit exaggerated.

Dr. Estivo indicated claimant provided a different history to Dr. Murati than she did to the Newton Medical Center concerning the mechanism of her injury. The doctor noted claimant was evaluated in 2006 for seizures and it was possible small seizures caused her dizziness and fainting. He also noted claimant has a history of hypertension and variations in blood pressure can result in episodes of dizziness and fainting. Another possibility may be that claimant was dehydrated and fainted. Dr. Estivo testified:

> Considering the previous history of this patient having dizzy spells and fainting spells dating back to at least 2006 and the fact that her story is completely different as compared to what she reported to the emergency room physician on the same day of the accident, it would be my opinion her accident arose out of a risk personal to Ms. Camacho or from an idiopathic cause rather than a work-related injury.
>
> . . .
>
> Yes, my opinion would be that it was some other general medical problem such as any of those that you just mentioned, blood pressure problems or diabetes or becoming overheated.[8]

Dr. Estivo opined claimant's October 7, 2011, fall was not the prevailing factor causing her lumbar spine and right hip complaints. Using the *Guides*, Dr. Estivo assigned claimant a 9% right lower extremity functional impairment and opined she did not need further medical treatment.

At the regular hearing, the ALJ stated, "I'm informed that there were three preliminary hearings already in this matter. That testimony is in. Any of the exhibits are going to require foundation. Okay?"[9] Respondent's attorney indicated he understood and claimant's attorney did not reply. Neither claimant's submission letter to the ALJ nor her brief to the Board asserted this was an issue.

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[8] Estivo Depo. at 11-12.

[9] R.H. Trans. at 7.

PRINCIPLES OF LAW AND ANALYSIS

The preliminary hearing transcripts are part of the record.

At oral argument before the Board, claimant argued the three preliminary hearing transcripts should not be part of the record. That was the first time claimant raised this issue. Claimant did not object to the admission of the preliminary hearing transcripts when, at the regular hearing, the ALJ indicated they were part of the record. The Board is limited under K.S.A. 2011 Supp. 44-555c to reviewing issues presented to and decided by an ALJ. The Board is not in a position to consider issues not raised before the ALJ.[10] Therefore, the three preliminary hearing transcripts, but not the exhibits thereto, are part of the record.

K.S.A. 2011 Supp. 44-508 applies to this claim.

Claimant argues K.S.A. 2011 Supp. 44-508 should not be applied to her claim, but instead the Board should use K.S.A. 2002 Supp. 44-508, which was in effect on the date claimant entered into her employment contract with respondent, to decide her claim. The Board disagrees with that legal theory, because K.S.A. 44-505(c), in effect when claimant entered into her employment contract with respondent and on the date of her accident, states:

> This act shall not apply in any case where the accident occurred prior to the effective date of this act. All rights which accrued by reason of any such accident shall be governed by the laws in effect at that time.

The Kansas appellate courts have also ruled the statute in place at the time of the work accident shall govern the claim.[11] In *Bryant*,[12] the Kansas Supreme Court stated:

> Nothing in the language of the Substitute for H.B. 2134 suggests that the legislature intended that the sections relevant to the present case be applied retroactively. . . .
>
> We therefore analyze the issues in this case under the statutory scheme in place when Bryant incurred his injury.

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[10] See *Carrillo v. Sabor Latin Bar & Grille*, No. 1,045,179, 2014 WL 5798458 (Kan. WCAB Oct. 24, 2014) and *Haskell v. Jory's Pride Restaurant*, No. 1,040,787, 2009 WL 607655 (Kan. WCAB Feb. 17, 2009).

[11] See *Parker-Rouse v. Larned Healthcare Center*, No. 107,221, 2012 WL 5392155 (Kansas Court of Appeals unpublished opinion filed Nov. 2, 2012) and *Jamison v. Sears Holding Corp.*, No. 109,670, 2014 WL 1887645 (Kansas Court of Appeals unpublished opinion filed May 9, 2014).

[12] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 588-89, 257 P.3d 255 (2011).

Claimant's personal injury by accident did not arise out of and in the course of her employment.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[13] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[14]

K.S.A. 2011 Supp. 44-508(f)(3)(A) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Kansas courts historically have interpreted the word "idiopathic" to mean "of unknown cause."[15] In this claim, the cause of the accident is known: claimant became dizzy and fell. Dr. Cook, who saw claimant at the emergency room a short time after her fall, testified claimant became lightheaded, lost her balance and fell. Claimant reported a history of becoming lightheaded because of fluctuations in her blood sugar, including a similar episode the day before her accident. The Board questions claimant's credibility, because claimant only later testified that she tripped and fell over an air compressor hose.

At oral argument, claimant indicated that because she initially did not have an interpreter at the Newton Medical Center emergency room, her description of how her injury occurred was misinterpreted or incomplete. The Board finds little merit in claimant's contention that her comments at the emergency room were misinterpreted. Claimant had

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[13] K.S.A. 2011 Supp. 44-501b(c).

[14] K.S.A. 2011 Supp. 44-508(h).

[15] See *State v. Massey*, 242 Kan. 252, 258, 747 P.2d 802 (1987), citing *Brain's Diseases of the Nervous System* § 22 (9th ed. 1985); *Principles of Neurology* Ch. 15 (3d ed. 1985); *Comprehensive Textbook of Psychiatry* § 3 (4th ed. 1985).

a friend interpret and Dr. Cook could understand Spanish and thought the services of the interpreter were adequate.

By her own admission, claimant had two incidents where she became dizzy in the two weeks before her work accident and on one of those occasions fainted. At the regular hearing, claimant downplayed those two incidents by testifying she was trembling which was different than feeling dizzy. That further casts doubt on claimant's credibility.

Claimant has a history of hypertension and uncontrolled diabetes. Her blood sugar level tested at the scene of the accident was high. Ms. Garza testified that at the scene of the accident claimant related she became dizzy and fell. The Board recognizes Ms. Garza is respondent's employee, but finds her testimony credible.

The Board finds the causation opinion of Dr. Estivo more credible than that of Dr. Murati. Dr. Murati's reports do not indicate he was aware claimant had a history of fainting spells or that Dr. Hayes saw claimant prior to November 14, 2011, for hypertension and diabetes or that claimant underwent a June 2006 MRI of the head for an evaluation of seizures. Dr. Estivo, who was aware of claimant's medical history of uncontrolled diabetes and fainting spells, opined claimant's fall was not work related, but rather resulted from a personal risk or idiopathic cause. The Board finds claimant's fall was the result of a personal risk, dizziness.

CONCLUSION

1. The three preliminary hearing transcripts, but not the exhibits thereto, are part of the record.

2. K.S.A. 2011 Supp. 44-508 applies to this claim.

3. Claimant's accidental injury was the result of a personal risk and, therefore, did not arise out of and in the course of her employment with respondent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[16] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the April 17, 2015, Award entered by ALJ Klein.

[16] K.S.A. 2014 Supp. 44-555c(j).

IT IS SO ORDERED.

Dated this ____ day of September, 2015.

BOARD MEMBER

BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge